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IN THE

Supreme Court of the United States

October Term, 1941

No. 543-545

ANDREW GRANT ILSENG, JR., ANDREW G. ILSENG and LESLIE A. McKERCHER,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND SUPPORTING BRIEF.

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I.

The holding by the Circuit Court of Appeals that sufficient foundation was laid for the introduction in evidence of the books and records and for the expert testimony based thereon seems clearly erroneous, as does also the holding by the Circuit Court of Appeals that the District Court was correct in overruling the petitioners' objection to the use of the entries in the books themselves to determine whether or not the books had been kept in the regular and due course of business 16

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II.

The holding of the Circuit Court of Appeals seems erroneous in declaring (a) even where a foundation for the introduction in evidence of books and records is not sufficient except under the more liberal rule laid down in 28 U. S. C. A., Section 695, entries which were made in such books earlier than the effective date of that statute are, nevertheless admissible; (b) that that statute is remedial only and does not affect any substantive right of one accused of crime; and (c) that of the two conflicting opinions in Valli v. United States, 94 Fed. (2d) 687, and Landay v. United States, 108 Fed. (2d) 698, the latter is the better reasoned and should be followed.... 19

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND SUPPORTING BRIEF.

To the Honorable, the Supreme Court of the United States:

The petitioners, Andrew Grant Ilseng, Jr. (hereinafter referred to as "Ilseng, Jr."), Andrew G. Ilseng (hereinafter referred to as "Ilseng, Sr.") and Leslie A. McKercher, pray that a writ of certiorari be issued by this court to review a judgment of the Circuit Court of

Appeals for the Ninth Circuit, entered June 13, 1941 [R. 840-853], reversing the judgment of the United States District Court for the Southern District of California, Central Division, pronounced on count one, affirming the judgment of the District Court pronounced upon the other counts, under which the petitioners had been found guilty, and remanding the case to the District Court for re-sentence of the petitioners and for disposition of the two other counts upon which the record was silent. In this behalf, petitioners show:

Opinions of the Court Below.

The District Court wrote no opinion. The opinion of the Circuit Court of Appeals [R. 840 to 853] has not yet been reported. No opinion was written by the Circuit Court of Appeals in denying the petition for rehearing.

Statement of the Case.

Petitioners were found guilty by the District Court, sitting without a jury, under an indictment in twenty counts, the first nineteen charging substantive offenses of "mail fraud" (18 U. S. C. A., Sec. 338) and the twentieth charging a conspiracy to commit an offense against the laws of the United States (18 U. S. C. A., Sec. 88). Ilseng, Jr., was sentenced to imprisonment for one year on count one and to a concurrent sentence of one year on each other count on which he was convicted of a mail fraud violation. As to him, sentence was sus-

pended on the conspiracy charge and he was placed on probation for three years. Each of the other petitioners was sentenced to three years' imprisonment on count one and to a similar concurrent term on each of the other counts on which he was convicted of a mail fraud violation and to a term of two years' imprisonment on the conspiracy count, such latter term to begin at the expiration of the term imposed under count one [R. 106, 108, 111].

The judgment of the Circuit Court of Appeals reversed all of the convictions under count one and set aside all sentences pronounced on the petitioners and remanded the cause to the District Court for resentence of the petitioners.

1. Ilseng, Sr., was in active control of various mining operations [Op. of C. C. A., R. 841] and voluminous books and records of those companies were introduced in evidence against all of the petitioners upon no other foundation than that: (a) they were at the date of trial (January, 1939) in the same condition (except for one minor change) as they were in May, 1937, when a post office inspector examined them [Op. of C. C. A., R. 844]; (b) they were the books used by the companies when a certain accountant was employed on April 2, 1934, which accountant had made some entries in some of those books, but not in all of them, between April 2, 1934, and August 23, 1936, when he left the companies' employ [Op. of C. C. A., R. 844]; (c) that they were the "books that were made available to me (another accountant) for

audit purposes" by Ilseng, Sr., in May, 1937, "and which I (he) used" [Op. of C. C. A., R. 845].

Yet the Circuit Court of Appeals said:

> "* * * We hold that the books and records were properly admitted into evidence and were clearly applicable to the case of Ilseng, Sr. * * *" [Op. of C. C. A., R. 848].

2. There was not the slightest evidence that Ilseng, Jr., or McKercher ever had anything to do with the keeping of the books, nor is there the slightest bit of evidence to show that they knew or had any idea of what the books contained. Neither the prosecution nor the District Court, nor the Circuit Court of Appeals, makes any such claim.

The Circuit Court of Appeals held:

> "Since the (District) Court found them (petitioners Ilseng, Jr., and McKercher) to be co-conspirators, the receipt of these proffered exhibits was correct as to them only if the evidence sustains such finding. We shall proceed to discuss this question." [Op. of C. C. A., R. 848.]

The discussion that follows clearly shows the Circuit Court of Appeals *used the evidence taken from those books and records themselves to establish that there was a conspiracy* of which McKercher and Ilseng, Jr., were a part. The Circuit Court then holds:

> "* * * we cannot find that the case is without substantial evidence to support the court's finding of guilt as to the conspiracy count of the indictment.

* * * This being so, of course the books and records were properly admitted against McKercher." [Op. of C. C. A., R. 851-852.]

"In the circumstances, the books and records were properly received (as against Ilseng, Jr.)." (Op. of C. C. A., R. 852.]

3. The prosecution offered the testimony of experts, based on the books, to show the falsity of financial statements used by the corporations and to prove that the dividends paid on the stock were illegal and improper, as charged in the indictment. No other evidence than that based on the books and records was offered to substantiate those charges.

The entries concerning which these experts testified were made during and covered a period from the fiscal year ending April 30, 1933 [R. 454], to September 30, 1937 [R. 463].

Nevertheless, the action of the District Court in admitting in evidence the books and records without the foundation usually required is approved by the Circuit Court when it says:

"The federal statute relating to the admission of books and records into evidence reads (28 U. S. C. A., Secs. 695 and 695h):

'In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of

any act, transaction, occurrence, or event, shall be admissible as evidence of said act, transaction, occurrence or event, if it shall appear that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility. The term "business" shall include business, profession, occupation, and calling of every kind.' * * *

'Sections 695 to 695h of this title shall be propective only and not retroactive.' "

* * * * * * * * *

"The indictment here was returned long after the statute became effective. It is true that some of the dates in the records introduced in the instant case predate the statute and Valli v. United States [C. C. A. 1], 94 Fed. (2d) 687, holds them to be inadmissible. The date of the indictment does not appear in the report of the cited case. The later, and in our opinion the better reasoned, case of Landay v. United States, 108 Fed. (2d) 698, holds that the statute changes the rule of evidence . . ." [Op. of C. C. A., R. 847.]

and holds admissible such records which predate the statute.

Basis of Jurisdiction.

Jurisdiction is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938.

The opinion of the Circuit Court of Appeals for the Ninth Circuit was filed June 13, 1941 [R. 853]; petition for rehearing was filed July 12, 1941 [R. 857]; and such petition for rehearing was denied July 23, 1941 [R. 857]. Application for stay of mandate pending application in this court for writ of certiorari was made and order staying the mandate to and including August 25, 1941, pending the application for writ of certiorari in this court was entered July 23, 1941 [R. 858].

The Questions Presented.

The decision on the three questions here presented depends to a large extent upon the consideration of Sections 695 and 695h of 28 U. S. C. A., copies of which sections are set out in paragraph 3, *supra*. In the interest of brevity, they are not here again copied. The questions are:

> I. Was sufficient or any foundation laid (and it will be admitted that the only foundation laid was that set out in paragraph 1, *supra*) for the introduction in evidence of the books and records and for the expert testimony based thereon, either under the provisions of Section 695 of 28 U. S. C. A., or under any other law, either as against (a) Ilseng, Sr., or (b) as against Ilseng, Jr., and McKercher?

Is the Circuit Court of Appeals correct in stating, with respect to the petitioners' objection, that "there was no foundation laid for the introduction of the books and records as they had not been shown to have been kept in the regular course of business; and that *the books themselves could not be used to determine whether or not they had been kept in the regular, due course of business*"

"The (District) Court overruled all of these objections and we think correctly"? [Op. of C. C. A., R. 846.] (Emphasis supplied.)

II. Under the provisions of Section 695 of 28 U. S. C. A., or under any law, was the Circuit Court of Appeals correct in holding the books and records and testimony of experts based thereon, are admissible against Ilseng, Jr. and McKercher on the ground that Ilseng, Jr. and McKercher were co-conspirators with Ilseng, Sr.?

III. Inasmuch as Section 695h of 28 U. S. C. A. specifically declares that Sections 695 to 695h of that title "shall be prospective only and not retroactive", is the Circuit Court of Appeals correct in holding that where books are introduced upon a foundation no broader than that required by Section 695 of 28 U. S. C. A., entries which predate the statute are also admissible; and in holding Section 695 is remedial only; and in holding that although there is an admitted conflict on this point between the Circuit Court of Appeals of the First and Sixth Circuits, the judgment of the latter should be followed, because it is "the better reasoned" of the two? [Op. of C. C. A., R. 847.]

Reasons for Granting the Writ As to Question I.

The question is new, highly important, and one of general law and has been decided by the Circuit Court of Appeals in a way that is probably untenable; the decision is also on an important question of federal law, which has not been but should be settled by this court, and in deciding the question the Circuit Court has sanctioned such a far departure by the District Court from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

The holdings of the Circuit Court of Appeals set forth under the caption "The Questions Presented," paragraph I (which, in the interest of brevity, are not repeated here) are apparently in conflict with the weight of authority and the applicable decisions of this court and of other Circuit Courts of Appeals in holding: (1) That sufficient foundation had been laid for the introduction of the books and of the expert testimony based thereon as against (a) Ilseng, Sr., and (b) Ilseng, Jr., and McKercher; and (2) that the books, themselves, could be used to determine whether or not they had been kept in the regular, due course of business.

As to Question II.

This is an important question of general law, decided by the Circuit Court of Appeals in a way probably untenable and in conflict with the weight of authority; it is a question of general importance, involving the construction and application of a statute of the United States which has not been, and should be, settled by this court, and in so deciding the Circuit Court has so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such a departure by the District Court as to call for an exercise of this court's power of supervision.

The holdings of the Circuit Court of Appeals, set forth under the caption "The Questions Presented," paragraph II (which, in the interest of brevity, are not repeated here), present questions involving the construction and application of statutes of the United States (28 U. S. C. A., Sections 695 and 695h) and the answers to which questions have never been, but should be, settled by this court, in that they directly affect the rights of a defendant charged with a criminal offense, and particularly with a violation of the conspiracy statute of the United States, to be confronted with the witnesses against him. The holdings of the Circuit Court of Appeals has so far departed from the usual and accepted course of judicial proceedings and has sanctioned such a far departure by the District Court from the usual and accepted course of judicial proceedings in such matters as to call for an exercise of this court's power of supervision.

As to Question III.

The Circuit Court of Appeals has decided an important question of general law in a way probably untenable and in conflict with the decision of another Circuit Court of Appeals (the First Circuit Court of Appeals) on the same matter; and has decided a question of general importance, involving the construction and application of a statute of the United States, which has not been, but should be, settled by this court, and in so deciding the Circuit Court has so far departed from the accepted and usual course of judicial proceedings and so far sanctioned such a departure by the District Court as to call for an exercise of this court's power of supervision.

The holdings of the Circuit Court of Appeals, set forth under the caption "The Questions Presented," paragraph III (which, in the interest of brevity, are not repeated here), are, by this Circuit Court's own admission, in conflict with the decision on the same point by the Circuit Court of Appeals for the First Circuit, as pronounced in *Valli v. United States* [C. C. A. 1], 94 Fed. (2d) 687 (cert. gtd. 3/28/38, 58 Sup. Ct. 760), and such holding by this Circuit Court of Appeals is probably in conflict with other applicable decisions of other circuits and of this court in holding that Section 695 of Title 18, U. S. C. A., is remedial only and removes the necessity of laying a foundation for documentary evidence with the same exactness as was required before the taking of effect of said Section 695 and in holding that when the require-

ments of Section 695 have been met entries in such documents that predate the statute are also admissible.

Petitioners respectfully represent that, accompanying this petition, and as an exhibit thereto, is a certified copy of the transcript of the entire record in this case, including the proceedings in the Circuit Court of Appeals for the Ninth Circuit.

Wherefore, it is respectfully submitted that this petition should be granted.

DAVID H. CANNON,
Attorney for petitioners.

Certificate of Verification.

State of California, County of Los Angeles—ss.

David H. Cannon, being first duly sworn, deposes and says: That he is counsel for Andrew Grant Ilseng, Jr., Andrew G. Ilseng and Leslie A. McKercher, petitioners in the within and foregoing action; that he prepared the within petition and that the matters therein are true as he verily believes, and that the same is not interposed for the purpose of delay.

DAVID H. CANNON.

Subscribed and sworn to before me this 19th day of August, 1941.

REED E. CALLISTER,
Notary Public in and for Said County and State.

IN THE

Supreme Court of the United States

October Term, 1941

No. .....

ANDREW GRANT ILSENG, JR., ANDREW G. ILSENG and LESLIE A. MCKERCHER,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION.

Jurisdiction.

This Court has jurisdiction under Section 240 (a) of the Judicial Code, as amended by Act of February 13, 1925, 43 Stat. 938.

Judgments of the trial court were entered January 31, 1939 [R. pp. 108, 110, 112].

Opinion of Court Below.

The opinion of the Circuit Court of Appeals was rendered and filed June 13, 1941, a copy thereof is printed in the record at pages 840 to 853. It has not yet been printed in the Federal Reporter.

A petition for rehearing, filed in the Circuit Court of Appeals on July 12, 1941 [R. 857] was denied July 23, 1941 [R. 857], application for stay of mandate pending application in this Court for a writ of certiorari, was made and an order staying the mandate to and including August 25, 1941, pending the application for writ of certiorari was entered July 23, 1941 [R. 858].

Statement.

A full statement appears in the petition and, in the interest of brevity, is not repeated here.

Specifications of Error.

1. The Circuit Court of Appeals erred in holding that sufficient foundation had been laid for the introduction of the books and records and for the expert testimony based thereon as against (a) Ilseng, Sr. and (b) as against Ilseng, Jr. and McKercher.

2. The Circuit Court of Appeals erred in holding that the District Court was correct in overruling petitioners' objection to the introduction of the books and records in evidence upon the ground that no sufficient foundation had been laid for their introduction and the further objection that the books themselves could not be used to determine whether or not they had been kept in the regular and due course of business.

3. The Circuit Court of Appeals erred in holding that the evidence showed Ilseng, Jr. and McKercher were co-conspirators with Ilseng, Sr. and that therefore the books

and records and the expert testimony based thereon were properly admitted in evidence against all of the petitioners.

4. The Circuit Court of Appeals erred in holding that Section 695 of 28 U. S. C. A. is remedial only, as held in *Landay v. United States* [C. C. A. 6] 108 Fed. (2d) 698, and that in this case the foundation laid for the introduction in evidence of the books and records and the testimony based thereon was sufficient under said section; and said Circuit Court of Appeals erred in holding that that statute applied to all of the entries, whether those entries were made before or after the effective date of that statute and all of the entries therefore became admissible, and that the contrary holding on the same question made in *Valli v. United States* [C. C. A. 1] 94 Fed. (2d) 687 should not be followed.

ARGUMENT.

I.

The Holding by the Circuit Court of Appeals That Sufficient Foundation Was Laid for the Introduction in Evidence of the Books and Records and for the Expert Testimony Based Thereon, Seems Clearly Erroneous, as Does Also the Holding by the Circuit Court of Appeals That the District Court Was Correct in Overruling the Petitioners' Objection to the Use of the Entries in the Books Themselves to Determine Whether or Not the Books Had Been Kept in the Regular and Due Course of Business.

Specifications of Error numbers 1, 2 and 3 will be discussed hereunder.

It cannot be gainsaid that the most substantial part of the prosecution's case depended upon proof that dividends were improperly paid and that false representations were made as to the financial status of the companies. Without that proof, probably none of the petitioners could have been convicted. Without the evidence from those books and records, there is no proof that any dividends were improperly paid or that the representations made as to the financial status of the companies were false.

That the seized books and records were in the same condition at the time of trial in January, 1939, as they were in May, 1937, when Post Office Inspector Smith examined them, certainly does not establish anything as to the regularity or method of keeping of the books [R. 177].

That these books and records were kept by the company during the period of employment of Mr. Schupbach [R.

424] between April 2, 1934, and August 23, 1936 [R. 421], and in some of them he had made entries and in some others he had made no entries [R. 423] does not justify their introduction and use as evidence over the period from May, 1933, to September, 1937 [Myerson's testimony, R. 467]. The period was prior to, during and beyond Schupbach's employment.

That these books were "made available to" Mr. Reimer "for audit purposes" in May, 1937, and were used by Reimer for that purpose [R. 449], without any showing that they were so made "available" by any of the petitioners does not establish any foundation at all for their use in evidence.

The books and records were not competent as against the petitioner Ilseng, Sr. upon any ground of an admission by him, because there is no showing that he ever did admit that they were the books of the companies they purported to be, nor did he actually or tacitly admit that they were correct, nor is there a word of evidence to indicate that he had knowledge of their contents.

There is even less in the record to connect these books and records with the petitioners Ilseng, Jr. and McKercher. It must be conceded that neither the record nor the actual facts justify any statement that Ilseng, Jr. or McKercher had anything whatever to do with or knowledge of what they contained.

If the books are not admissible in the first instance as against any of the petitioners, it is difficult to understand how resort may be had to the *contents* of the books "to determine whether or not they had been kept in the regular, due course of business" as is, in effect, declared by

the Circuit Court of Appeals [Op. of C. C. A., R. 846]. The error seems clear.

If, for the reasons stated, the books are competent only as against Ilseng, Sr., and are only admissible against Ilseng, Jr. and McKercher on the theory of conspiracy, it is difficult to follow the argument of the Circuit Court of Appeals that resort may be had to the *contents* of the books to determine that the statements made and things done by Ilseng, Jr. and McKercher were unjustified, as shown by the books and records, and being so determined to be unjustified they (Ilseng, Jr. and McKercher) must have been "co-conspirators" with Ilseng, Sr. The logic seems bad and the error is obvious.

To illustrate: The Opinion of the Circuit Court of Appeals starts out with the premise that the books were admissible as against Ilseng, Sr. and proceeds to argue substantially as follows:

(1) That the trial court had found that McKercher and Ilseng, Jr. were co-conspirators with Ilseng, Sr.;

(2) That, therefore, the books were admissible as to them;

(3) That by the books themselves McKercher and Ilseng, Jr. knew of the bad financial condition of the companies, of the illegality of the dividend payments, of the worthlessness of the stock, etc., and,

(4) That therefore they became co-conspirators with Ilseng, Sr.

Such logic does not appear to us to be at all sound.

II.

The Holding of the Circuit Court of Appeals Seems Erroneous in Declaring (a) Even Where a Foundation for the Introduction in Evidence of Books and Records Is Not Sufficient Except Under the More Liberal Rule Laid Down in 28 U. S. C. A., Section 695, Entries Which Were Made in Such Books Earlier Than the Effective Date of That Statute Are, Nevertheless, Admissible; (b) That That Statute Is Remedial Only and Does Not Affect Any Substantive Right of One Accused of Crime; and (c) That of the Two Conflicting Opinions in Valli v. United States, 94 Fed. (2d) 687 and Landay v. United States, 108 Fed. (2d) 698, the Latter Is the Better Reasoned and Should Be Followed.

Specification of Error number 4 will be discussed hereunder.

Section 695 of 28 U. S. C. A., above referred to, is printed in full in the foregoing petition for writ of certiorari at pages 5-6 and, in the interest of brevity, is not reprinted here.

This same section is copied in full in the opinion of the Circuit Court of Appeals [R. 845].

This section does not abolish the rule of evidence that existed before the statute became effective and which required that before books and records are admissible in evidence they must first be shown to have been made in the regular course of business; in fact, the statute expressly confirms that old requirement. This the Circuit Court of Appeals seems to have completely overlooked.

As above pointed out, there is no showing in the entire record that such books were kept "in the regular course of business." Obviously, therefore, the statute avails nothing to the Circuit Court or to the prosecution. Simply stated, it is clear that if the books are shown to have been kept in the regular course of business they are admissible; if not so shown, they are not admissible.

As stated in *Greenbaum et al. v. United States* (C. C. A. 9), 98 Fed. (2d) 574, 578:

> "As a general rule, and in the absence of statute, unless it can be shown that the entries in the books sought to be introduced in evidence against one not a party chargeable with an interest in their keeping were either original entries or the first permanent entries of the transactions and kept in the regular course of business, the books are not admissible, as within the 'hearsay' rule."

This argument as to the admissibility of the books does not involve a question as to the sufficiency or insufficiency of the evidence to convict the petitioners, but has directly to do with the question as to whether or not Section 695 of 28 U. S. C. A. abrogates all rules heretofore existing making it necessary to lay some sort of foundation for the introduction into evidence of books and records.

Although the Circuit Court of Appeals in this opinion disagrees with the holding in *Valli v. United States*, 94 Fed. (2d) 687, and says, under the holding in that case, the entries in these books which predate the statute would be inadmissible, that same Circuit Court, in discussing

this identical statute, cited with approval this same case of *Valli v. United States.* (See *Greenbaum et al. v. United States* (C. C. A. 9), 98 Fed. (2d) 574, 578.)

Landay v. United States (C. C. A. 6), 108 Fed. (2d) 698, which this Circuit Court says has a "better reasoned" opinion than does *Valli v. United States,* is hardly a convincing authority against the petitioners' contentions that the entries which predate the statute are not admissible, because in *Landay v. United States,* in passing upon the sufficiency of the identification of the books which had been received in evidence, the Court said:

> "The proof satisfied the test laid down by this Court in Johnson v. United States, 6 Cir., 89 F. (2d) 913."

The test laid down in *Johnson v. United States, supra,* is declared in the opinion as follows:

> "It is not necessary to the admissibility in evidence of a memorandum or note of a transaction that it be identified by the person who made the original entry. If it is the first permanent record, the identification may be made by the one who has the custody or control of it or had general authority over the making of it."

This case of *Johnson v. United States* was decided in April, 1937, about nine months later than the enactment of 28 U. S. C. A. 695. No such showing as is required under the authority of *Johnson v. United States, supra,* was made in the instant case.

Conclusion.

The questions here submitted are surely of great importance. Upon their proper answer may depend the life or liberty of persons accused of crime. Post rationalization to the effect that the books are admissible only if a conspiracy exists, and that the books themselves show guilty knowledge, and therefore a conspiracy, and for that reason the books are admissible, ought not to be indulged. The changing of the rules of evidence touching book entries by resorting to a statute which expressly declares it "shall be prospective only and not retroactive" has denied to the petitioners due process of law in permitting to be used against them evidence of a character not permitted by law at the time when the alleged wrongful acts were committed.

Because this case is one calling for the exercise by this Court of its supervisory powers the writ of certiorari should issue.

Respectfully,

DAVID H. CANNON,
Attorney for Petitioners.

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In the Supreme Court of the United States

OCTOBER TERM, 1941

NOS. 543, 544, 545

ANDREW GRANT ILSENG, JR., ANDREW G. ILSENG AND LESLIE A. MCKERCHER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 840–853) is reported at 120 F. (2d) 823.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered June 13, 1941 (R. 854–856), and a rehearing denied July 23, 1941 (R. 857). The petition for a writ of certiorari was filed August 25, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. See

also Rule XI of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether a sufficient foundation was laid for the introduction in evidence of certain books and records.

2. Whether it is proper, pursuant to the Act of June 20, 1936, to admit in evidence in a criminal proceeding commenced in 1937 entries in books and records made before the enactment of that statute.

STATUTES INVOLVED

The Act of June 20, 1936, 49 Stat. 1561, 1562, 1564 (28 U. S. C., Supp. V, Sec. 695–695h), provides:

> * * * That in any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of said act, transaction, occurrence, or event, if it shall appear that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown

to affect its weight, but they shall not affect its admissibility. The term "business" shall include business, profession, occupation, and calling of every kind.

* * * * *

SEC. 9. This Act shall be prospective only, and not retroactive.

STATEMENT

An indictment returned September 29, 1937, charged petitioners in nineteen counts with using the mails to defraud and, in one count, with conspiracy (R. 2–99). It alleged that from 1932 to 1937 petitioners devised and carried out a scheme to defraud by inducing certain individuals and firms to invest money in, and extend credit to, various mining corporations, organizations, and interests, of which petitioners were officers, agents, and employees. It alleged that false representations and promises were knowingly made by petitioners for the purpose of obtaining money and other things of value from investors and creditors; and that in furtherance of the scheme various letters, pamphlets, maps, advertisements, and other papers, each containing fraudulent statements, were sent through the United States mails. The case was tried to a judge without a jury and resulted in findings of guilt and sentences of all of the petitioners on all counts except 9 and 16 (R. 106–112). No disposition was made as to these two counts.

Certain books and records of one of petitioners' corporations were introduced at the trial as evidence of the falsity of representations concerning the financial condition of that company. F. E. Smith, a Post Office inspector, testified that he had seized books and records in the office of the International Mining and Milling Company, the corporation involved, and that these books were in the same condition at the time of the trial as they were when he first looked at them, with one immaterial exception (R. 158). Robert V. Schupbacher testified that he was an accountant employed by the International Mining and Milling Company from April 2, 1934, to August 23, 1936, and kept the books during that period; that the books exhibited to him while he was testifying were the books of the company which he kept; and that he had made entries in some of them during his employment but had not made entries in all nor made all the entries in any (R. 421–424). John L. Reimer, a certified public accountant, testified that he was employed by petitioner Ilseng, Sr., in May 1937, to make an audit for the International Mining and Milling Company and that the books produced by the Government at the trial were the books made available to him for audit purposes (R. 449).

The trial judge found that a sufficient foundation had been laid and admitted the books and records in evidence (R. 424–429), and his action was affirmed on appeal.

ARGUMENT

I

Petitioners contend that the books and records were not shown to have been kept in the regular course of business and hence that no proper foundation was laid for their introduction in evidence under the Act of June 20, 1936, *supra* (Pet. 16–18, 20). Apart from the internal evidence supplied by the books and records themselves, it is a sufficient answer to this, as the Circuit Court of Appeals indicated (R. 846), that the uncontradicted testimony shows that they were furnished both to Schupbacher as bookkeeper, and to Reimer, the certified public accountant, for purposes of audit, by petitioner Ilseng, Sr., as the books and records of the International Mining and Milling Company. Whether books and records have been sufficiently identified to afford a proper foundation for their admission is a matter within the sound discretion of the trial judge. *St. Paul Fire and Marine Ins. Co.* v. *American Food Products Co.*, 21 F. (2d) 733, 736, 737 (C. C. A. 8), certiorari denied, 277 U. S. 597. Since the trial court found that petitioners Ilseng, Jr., and McKercher were co-conspirators with Ilseng, Sr.,[1] these records were on the same ground admissible against them.

[1] It is not true, as petitioners contend (Pet. 18), that the Circuit Court of Appeals reasoned in a circle in finding that Ilseng, Jr., and McKercher were parties to the conspiracy by consulting the books and records themselves. It is clear

II

(a) Petitioners contend further that entries in books and records made before the effective date of Section 1 of the Act of 1936, are not admissible thereunder in view of the provision of Section 9 that the statute shall have only prospective application (Pet. 19–22). It is apparent, however, that the language in Section 9 means no more than that Section 1 shall not be construed to change evidentiary rules in cases pending at the time of its passage. Section 1 is a remedial statute enacted to obviate difficulty in introducing records into evidence because of the absence, death, or nonavailability of the entrants and in recognition of the use of mechanical devices and the subdivision of function in the making of records under modern corporate accounting methods. The statute is clearly aimed not at the validating of the entries themselves but only at facilitating their admission in evidence, so that inquiry as to the particular date on which an entry was made is not helpful in a situation in which, as here, it is sought to be introduced in an action begun after the effective date of the statute (49 Stat. 1559, 1564).[2] *Landay* v. *United States*, 108 F. (2d) 698,

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the court reached the conclusion that they were involved in the conspiracy from evidence other than the books and records (R. 848–852).

[2] The statute became effective June 20, 1936 (49 Stat. 1561, 1564); the indictment was returned September 29, 1937 (R. 99).

704–707 (C. C. A. 6), certiorari denied 309 U. S. 681; *United States* v. *Kelley,* 105 F. (2d) 912, 917 (C. C. A. 2).

Petitioners' argument on this point is substantially the same as that urged in support of a petition for writ of certiorari in the *Landay* case, *supra,* which this Court denied, 309 U. S. 681. The petitioner in that case, as in this, endeavored to trace a conflict with *Valli* v. *United States,* 94 F. (2d) 687 (C. C. A. 1). The opinion and record in the *Valli* case, however, do not reveal the date upon which the indictment was filed, and it is a permissible inference from the allegations of the indictment that it was returned prior to the effective date of Section 1.[3]

(b) The books and records were, we submit, admissible even without the assistance of Section 1. Prior to the enactment of that section the course of decision in federal courts had been one of increasing liberality in the admission of books and records because of the realization of the growing complexity and magnitude of commercial transactions and the resultant impracticality or impossibility of producing individual entrants. These deci-

[3] See record in the *Valli* case, No. 814, October term, 1937, pp. 2, 3, and 6. The principal question in that case was the admissibility of intrastate telephone conversations intercepted by the Government by wire tapping. After certiorari was granted, 303 U. S. 632, the case was dismissed upon the motion of petitioners, 304 U. S. 586.

sions in themselves would support the admission of these books and records.[4]

(c) The books and records were introduced only in support of the misrepresentations concerning the financial condition of the International Mining & Milling Company. The indictment alleged other misrepresentations with reference to the productive qualities of petitioners' mining properties (R. 7–15). As indicated in the opinion of the Circuit Court of Appeals (R. 843), these misrepresentations were abundantly proved. It was unnecessary for the Government to establish the falsity of all the misrepresentations specified in the indictment.

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[4] Illustrative of this tendency are: *Mississippi River Logging Co.* v. *Robson*, 69 Fed. 773 (C. C. A. 8); *Wilkes* v. *United States*, 291 Fed. 988, 993 (C. C. A. 6); *E. I. Du Pont de Nemours & Co.* v. *Tomlinson*, 296 Fed. 634, 641 (C. C. A. 4); *United States* v. *Mammoth Oil Co.*, 14 F. (2d) 705, 732 (C. C. A. 8), affirmed, 275 U. S. 13; *Massachusetts Bonding & Ins. Co.* v. *Norwich Pharmacal Co.*, 18 F. (2d) 934 (C. C. A. 2); *Cub Fork Coal Co.* v. *Fairmont Glass Co.*, 19 F. (2d) 273 (C. C. A. 7); *Adler* v. *New York Life Ins. Co.*, 33 F. (2d) 827, 832 (C. C. A. 8); *United States* v. *Cotter*, 60 F. (2d) 689 (C. C. A. 2), certiorari denied, 287 U. S. 666; *Jennings* v. *United States*, 73 F. (2d) 470, 473 (C. C. A. 5); *Johnson* v. *United States*, 89 F. (2d) 913, 915 (C. C. A. 6); *Capozzi* v. *United States*, 90 F. (2d) 921, 923 (C. C. A. 3); *O'Shea* v. *United States*, 93 F. (2d) 169, 171 (C. C. A. 6).

CONCLUSION

The petition for writ of certiorari presents no question of general importance and there exists no actual conflict of decisions. We therefore respectfully submit that it should be denied.

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